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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

Conservatorship of the Person and Estate of
HELEN WONG.

EILEEN WONG, as Conservator etc.,

Petitioner and Respondent,

v.

SUNG YUEN WONG,

Objector and Appellant.

B214787

(Los Angeles County
Super. Ct. No. LP012785)

Conservatorship of the Person and Estate of
HELEN WONG.

EILEEN WONG, as Conservator, etc.,

Petitioner and Appellant,

v.

SUNG YUEN WONG,

Respondent.

B227118

(Los Angeles County
Super. Ct. No. BD520038)

APPEALS from orders and judgments of the Superior Court of Los Angeles County, Michael R. Hoff, Frank J. Johnson, James A. Steele, Richard Montes and Mark Borenstein, Judges.

Fleishman & Fisher and Barry A. Fisher for Sung Yuen Wong.

Law Office of Lisa MacCarley and Lisa MacCarley for Eileen Wong.

These appeals arise from the conflicting efforts of Sung Yuen Wong, known as Sy,¹ and his daughter, Eileen Wong, to care for Helen Wong, Sy's wife of more than 60 years and Eileen's mother. Helen suffered a debilitating stroke in December 2006 at the age of 80 that left her with limited use of the right side of her body and unable to speak or walk. In May 2007 Eileen, concerned her father, then age 84, could not adequately care for Helen, petitioned to have herself appointed conservator of Helen's person and estate. (Prob. Code, § 1800 et seq.)² Sy, who insisted he should be allowed to care for Helen at their home through their final years notwithstanding his own infirmities, resisted Eileen's efforts at every juncture. Eileen responded with further petitions to limit her father's control over her mother. Now, nearly five years later, we affirm the challenged orders of the probate and family courts, leaving Eileen the conservator of the person and estate of Helen.

FACTUAL AND PROCEDURAL BACKGROUND

1. Sy and Helen's Marriage and Helen's Stroke

Sy and Helen were married in Bern, Switzerland in 1949, after enduring the Japanese occupation of their native Shanghai. Sy and Helen emigrated to the United States and settled in Tarzana where they lived for more than 45 years, raising two

¹ Because the members of the Wong family share the same last name, we refer to them by their first names for convenience and clarity. (See *Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1191, fn. 1.)

² Statutory references are to the Probate Code unless otherwise indicated.

children, Eileen and Stanley. Sy held a doctorate in electrical engineering and worked as a computer scientist.

Helen suffered a stroke on December 17, 2006. As a result, she has limited use of the right side of her body, cannot speak and uses a wheelchair for mobility. She can communicate her basic needs only through gestures, nods and eye movements. Helen also suffers from diabetes and high blood pressure. After her stroke she remained in a rehabilitative facility until mid-April 2007, when she returned to the family home under Sy's care.

2. Eileen's Temporary Conservatorship

On May 17, 2007 Eileen filed a petition to have herself appointed conservator of the person and estate of her mother. The petition alleged "Adult Protective Services" had been contacted to investigate Helen's living conditions.³ On May 31, 2007 Eileen filed an ex parte petition for a temporary conservatorship, supported by a declaration from Helen's physician stating Helen suffered from major impairments in her ability to process information and lacked capacity to give informed consent to any medical treatment. Eileen requested an order allowing her to immediately move Helen to an assisted care facility because Sy was incapable of caring for her.

Sy and his counsel appeared at the ex parte hearing and objected to the requested conservatorship. Notwithstanding Sy's objection, the court granted the temporary conservatorship over Helen's person and authorized her removal to Flair Manor, a nursing home. Eileen withdrew her request for control over Helen's estate, and the court

³ As she later reported, Eileen initiated the conservatorship process because, following Helen's stroke, she had been inundated with calls from adult protective services, Kaiser Home Health Care and other medical professionals, who complained about Sy's micro-management and interference with Helen's medical treatment and the condition of the couple's home. According to Eileen, these professionals believed Sy's stubborn attitude and controlling behavior posed a threat to Helen's safety and well-being.

ordered Sy to deposit \$10,000 to cover Helen's needs pending the July 20, 2007 hearing on the permanent conservatorship.⁴

In anticipation of the July 20, 2007 hearing, Helen's appointed counsel,⁵ Howard Myers, submitted a report summarizing his findings and recommendations on the petition. According to the report, Helen's physician and social worker agreed Helen required around-the-clock care. Before the hearing on the temporary conservatorship Myers had visited the family home and "found [it] to be in disarray with various things stacked on [al]most every available space." There was no air conditioning; the kitchen and bath were not sufficiently clean; and there was "little if any room" to accommodate a wheelchair. Sy appeared unwilling to hire a full-time caregiver. In a second visit on July 9, 2007, Sy had made progress in organizing the home; but there was "still much to be done." The dining room and kitchen were "unusable," and the kitchen and bathroom required "professional cleaning to be safely used for food preparation and personal hygiene." Myers also visited Flair Manor and found it to be clean and well-managed, with assistance available to Helen 24 hours per day. In Myers's view, Helen was "aphasic" and communicated with difficulty. While "[i]t was obvious [she] was pleased to see [Sy]," Myers believed Helen communicated to him that Sy was unable to care for her on his own. Myers recommended Eileen continue as conservator of Helen's person and that Helen remain at Flair Manor.

Myers's assessment of the situation was echoed by the probate investigator. Interviewed at Flair Manor, Helen was "appropriately dressed and groomed" but "lethargic" and "unresponsive." The investigator concluded Helen did not understand the

⁴ Although not an evidentiary hearing, events at court illuminated the nature of the problem. While waiting for the matter to be called, Helen, who had been brought to the hearing by Sy, became agitated. After court personnel placed an emergency call, firefighters and paramedics responded and decided to take Helen to the hospital. Sy objected, claiming Helen had already calmed herself and would be fine to remain at the hearing. He then accused Eileen's counsel of "highhandedness" and asserted to the court his constitutional rights had been violated.

⁵ Pursuant to Eileen's request, the court had appointed counsel for Helen on May 9, 2007. (See § 1471.)

meaning of conservatorship and was unable to appreciate her rights in the proceeding. The investigator also visited the Wongs' home and interviewed Sy. Sy had "visible physical health concerns," became fatigued walking 50 feet to his home and had difficulty opening a refrigerator door. According to the investigator, Sy appeared to believe he could care for Helen alone, with assistance provided for several hours two to three days each week. The investigator disagreed Sy would be able to provide the intensive care required by Helen or evacuate her in case of an emergency. The investigator also interviewed Stanley, who believed Eileen was appropriately seeking the conservatorship. In Stanley's view his father believed his ability to care for Helen was a test of will and would not admit he could not meet Helen's needs. Sy had dropped Helen on occasion while transferring her from her wheelchair, yet refused to accept he required additional assistance in caring for her. The investigator concluded it would not be prudent to allow Helen to return home and recommended Eileen's petition for conservatorship be granted.

At a hearing on July 20, 2007 the probate court denied Sy's petition to terminate the temporary conservatorship, scheduled an evidentiary hearing for November 6, 2007 and extended the temporary conservatorship until that date. After Helen's physician was deposed on August 2, 2007, Sy brought another ex parte petition to terminate the conservatorship. Again, the court denied the petition. On October 11, 2007 Sy brought a motion seeking relief from restrictions imposed by the nursing home on his visits with Helen. The motion was denied. The court sua sponte, however, set a visitation schedule for Helen at the Wong residence, subject to the presence of a caregiver for the first three weeks (a condition that would be reevaluated after that period), and ordered Sy to ensure his house had working climate control and a security fence around the empty swimming pool and be maintained in a clean and sanitary condition. The court expressly barred Sy from driving Helen and ordered him to pay \$5,000 per month for her care. The evidentiary hearing on Eileen's petition was continued to May 13, 2008 at Sy's request.

On December 12, 2007 Eileen's counsel filed a petition for an order fixing attorney fees and a notice setting a hearing on the petition for January 3, 2008. At the

same time Sy filed another motion to dismiss the conservatorship petition or, in the alternative, for an appointment of himself as conservator, replacing Eileen. At the January 3, 2008 hearing, the court allowed extensive participation by Sy, as well as his counsel, and urged the parties to resolve the case through mediation. Eileen agreed; Sy refused. At the suggestion of Helen's counsel, the parties agreed to consider the appointment of a professional conservator to minimize conflict, even though those services would be more costly than those provided by Eileen. The court also offered to visit Helen at Flair Manor and to inspect Sy's house to assist in evaluating the petition. The court granted the petition of Eileen's counsel for payment of approximately \$40,000 in attorney fees.

Helen's counsel also submitted a petition for payment of his fees, which was heard on February 5, 2008. Appearing at the hearing to object to any order for payment of fees to Helen's counsel, Sy contended Helen's counsel had been illegally appointed and his services were unnecessary. The court rejected Sy's objections and granted the petition for fees.

3. The Replacement of Eileen by a Professional Conservator

On February 20, 2008 Helen's counsel filed an ex parte application for the appointment of Jeffrey Siegel, a professional conservator, as temporary conservator of Helen's person, because of the ongoing friction and acrimony between Sy and Eileen. Sy objected to the appointment; Eileen agreed and submitted her resignation as temporary conservator. The court appointed Siegel as Helen's temporary conservator and authorized him to open a bank account from which to pay for Helen's needs. The court also ordered Sy to pay a minimum of \$5,000 on the first day of each month to the account administered by Siegel.

Siegel filed a conservatorship care plan for Helen on March 3, 2008 that contemplated returning Helen to her home once it had been "put into livable condition." At an April 15, 2008 hearing Sy objected to the conservator's care plan and submitted what he called an "alternative" plan for the court's review if the court would not agree to

terminate the conservatorship.⁶ Sy proposed Helen be transferred to a new care facility, In Gentle Hands, that would allow him to live with her at the facility. After viewing In Gentle Hands, the parties agreed to move Helen there. At Sy's request, the trial date was continued for 30 to 45 days.

Meanwhile, the probate investigator for the superior court filed his report on May 7, 2008. According to the report, Helen, who was still living at Flair Manor when the investigator met with her, appeared to be calm, clean and comfortable. She was able to acknowledge her name but was unable to communicate verbally and appeared not to understand the significance of the conservatorship. The conservator had informed the investigator that Sy's home remained "a disaster." Sy, on the other hand, advised the investigator Helen was a "prisoner" and had been "kidnapped"; was not receiving quality care at Flair Manor; was not as confused as she appeared to be; and communicated only with him. Sy claimed he and Helen had lived for years in the house as it was and, although he had made some modifications, would make others only if "someone puts a gun to my head." The Flair Manor administrator asserted Sy had demonstrated inappropriate behavior when he visited Helen "approximately 60 [percent] of the time" and that his behavior upsets everyone, including Helen. The investigator recommended the conservatorship remain in place.

The move to In Gentle Hands did not resolve the conflict between Sy and the rest of his family over Helen's care. Although Sy was eventually allowed to spend overnights at the facility with Helen, the conservator directed the administrator not to allow any closed door visits without an approved caregiver and barred Sy from taking Helen off the premises without the conservator's approval. A pretrial mediation failed. On July 9, 2008—the eve of trial—Sy filed an extensively documented ex parte application seeking permission to live with Helen at In Gentle Hands with the door closed and no observer, to drive Helen to appointments and home visits, to remove Siegel as the temporary

⁶ Until this hearing Judge Michael Hoff had presided over this matter. Judge Frank Johnson took over the case upon Judge Hoff's retirement.

conservator, to remove Myers as Helen's legal counsel and, in the alternative, to dismiss Eileen's conservatorship petition as no longer warranted. In support of his application Sy submitted a declaration from the administrator of In Gentle Hands, who stated Sy had been a loving caregiver for Helen and had not been a disruptive presence at the home. In fact, according to the administrator, Helen's requests for frequent toileting at night had been difficult to accommodate until Sy began staying with Helen and attending to her nightly needs.⁷ The administrator also confirmed Helen was alert and aware of her surroundings and had learned effective communication skills. The application was also supported by numerous photographs Sy had taken of his home and his interaction with Helen.

Also on July 9, 2008 Myers, Helen's appointed counsel, submitted his report to the court. Myers stated he continued to believe that Helen required a conservatorship of the person, that Eileen should be the conservator and that it was still inappropriate to return Helen to her home because it remained insufficiently safe, clean and habitable for her. "Until the changes to the home are accomplished and Sy agrees to retain enough caregiver assistance in the home, Helen should remain in residence at [In Gentle Hands]."

On the morning of the hearing of the ex parte hearing, Sy woke Helen and took her from In Gentle Hands by disabling the alarm on her door. He brought her to court although he had forgotten to feed her or give her prescribed medications. Once at court, Eileen took control of her mother and returned her to In Gentle Hands. Sy's ex parte application was denied.

4. Trial Proceedings and Eileen's Appointment as Conservator

Trial on Eileen's petition was conducted over the course of eight days in July and August 2008. Sy presented expert testimony from a neurologist and a clinical

⁷ At trial the administrator refused to concede Sy was attending to Helen's needs because the home's insurance coverage extended only to paid caregivers. Eileen had objected to Sy's overnights on the ground he was waking Helen up too often and tiring her excessively.

psychologist who testified Helen's condition did not prevent her from living at home in the care of Sy. At the close of testimony the court took the matter under submission.

On August 18, 2008, shortly before trial testimony was concluded, Sy filed his own petition for a conservatorship over the person of Helen. Pursuant to the filing of Sy's petition, the court probate investigator, who several months earlier had interviewed Helen at Flair Manor, visited her at In Gentle Hands. Under the investigator's questioning Helen nodded when asked her identity but appeared confused and began to cry when he inquired about the conservatorship petitions. The investigator concluded Helen continued to require a conservatorship. He did not revisit the couple's home but spoke by telephone with Sy. Referring to the prolonged litigation, the investigator noted, "From all indications, [Sy] is a devoted husband. His love and commitment to his wife is very obvious. Unfortunately, his stubborn and unyielding personality is exactly what triggered his daughter's initial petition . . . and has kept the battle raging. He has had plenty of time and ample opportunities to fix up the dilapidated house and soften his stance."

On September 30, 2008 Sy again removed Helen from In Gentle Hands, taking her to their home to celebrate their 59th wedding anniversary. The administrator of the facility reported Helen's removal to the police, who first brought Sy and Helen to the police station and then returned Helen to In Gentle Hands. Later that same morning Sy again removed Helen from In Gentle Hands; but, when the administrator called the police, he was told a court order was required to prevent Sy from taking Helen. The situation escalated after Eileen arrived at her parents' home to take Helen to a dentist appointment. Eileen found the couple lying on their bed and approached Helen to help her get up. Sy became incensed and pushed her away. Eileen then tried to comfort Helen, who had become upset; but Sy pinned Eileen on the bed and threatened to hurt her if she touched Helen. Eileen freed herself and called the police. After a social worker arrived to defuse the situation, Eileen took Helen to the dental appointment.

On October 2, 2008 Sy again removed Helen from In Gentle Hands. At Eileen's request, the police came to the Wongs' house but advised her they required a court order

to intervene. When a caregiver from In Gentle Hands arrived to give Helen her medication, Sy insisted on doing it himself. At this juncture, the responding officer deemed the situation threatening and called a paramedic unit to take Helen to the hospital.

On October 3, 2008, with the approval of the conservator, Eileen took Helen to a new care facility, the location and identity of which was not disclosed to Sy.⁸ On October 6, 2008 Eileen filed a request for a temporary restraining order against Sy on the ground of elder abuse and renewed her petition for appointment as temporary conservator. Siegel, the professional conservator, and Myers, Helen's counsel, agreed Eileen should be reappointed as temporary conservator. The court issued the temporary restraining order barring Sy from contacting Helen, appointed Eileen temporary conservator and scheduled an evidentiary hearing on the petition for a permanent restraining order for October 21, 2008. After the hearing the court denied Sy's petition to be appointed as Helen's conservator and ruled that Eileen would be appointed as conservator. The court also set a schedule for Helen to visit Sy at the couple's home or in a neutral location. In announcing its ruling, the court acknowledged the difficulty of the case and the court's continuing expectation the parties would resolve their differences. The court added, "I'm very dismayed at the lack of judgment shown by Dr. Wong, and it makes it impossible for me to appoint him as the conservator at this time." "I don't want Dr. Wong cut off from his wife" "but I need some cooperation from him. I haven't gotten any." The court also ordered Sy to pay Eileen a monthly allowance of \$5,000 to pay for Helen's care and a one-time payment of \$1,000 to pay for a caregiver to transport Helen on visits to the Wongs' home. Eileen's elder abuse petition was denied without prejudice.

⁸ As he had done earlier with Flair Manor, Sy stopped paying In Gentle Hands and failed to deposit funds for Helen's care with the conservator. Eileen paid for Helen's care at the new facility pending court approval.

On January 8, 2009 the court entered its order appointing Eileen conservator of Helen's person and on January 14, 2009 issued a statement of decision as requested by Sy.

5. *The Petitions for Attorney Fees, Eileen's Subsequent Petition for Conservatorship of Helen's Estate and the Ongoing Dispute Over Visitation*

The professional conservator, Eileen's counsel and Helen's appointed counsel all filed petitions for compensation following the court's ruling.⁹ In response to Sy's resistance to paying the costs of Helen's care and the attorney fees, however, Eileen filed a second petition for conservatorship of Helen's estate on January 15, 2009 on the ground Sy had claimed he was no longer able to pay for Helen's care. Following receipt of the new petition, Sy paid the court-ordered sum for Helen's care and the \$1,000 for a caregiver to monitor the couple's visits but sought an order from the court to force Eileen to comply with the earlier visitation order and to terminate the conservatorship.¹⁰ At a February 26, 2009 hearing the court ordered Eileen to adhere to the previously ordered visitation schedule and ordered Sy to pay for the required caregiver to accompany Helen and to prepare the house adequately for Helen's visits. The court threatened the parties with sanctions for failure to comply with the court's orders.

Sy's visits with Helen resumed. However, caregivers at the nursing home reported in April 2009 that Helen had begun to resist her visits with Sy. At the suggestion of Myers, the court directed Eileen to obtain an assessment from a home health care agency of Helen's feelings about visiting Sy. On May 15, 2009 the director of the agency and the administrator of the nursing home separately and jointly interviewed Helen. Helen

⁹ The court granted Myers's fee petition on January 14, 2009; Eileen's counsel's petition on March 2, 2009; and Siegel's fee petitions on March 19, 2009. Supplemental petitions for Myers and Eileen's counsel were granted on October 26, 2009. On December 4, 2009 the court filed a stipulated order directing these amounts be paid from Helen and Sy's community property.

¹⁰ The case had been assigned to a new judge, the Hon. James A. Steele. Judge Steele, like the jurists before him, tried with limited success to move the parties toward resolution of their disputes with less court intervention.

consistently answered through gestures and head shakes that she no longer wanted to visit Sy.

Sy immediately moved for a second assessment, which the court denied. The court requested Eileen arrange for Helen to appear in court to enable the court to directly assess Helen's capabilities. Helen appeared on July 23, 2009, and the court conducted limited questioning of her in the presence of all parties. Helen was unable to respond to complex questions but answered clearly in the affirmative when asked if she wanted to continue to be represented by her counsel, Myers. She also acknowledged she was unable to handle her own finances. The court then stopped the questioning of Helen and allowed her to leave.

Transcripts of hearings from March through July 2009 reveal the court's diminishing trust in Sy's commitment to Helen's best interests. The court twice urged Sy to resolve the matter by bringing his home into compliance with Helen's needs. On May 1, 2009 the court ordered Sy to produce records of his expenditures on Helen's behalf and to identify the remaining community property assets available for Helen's care. The parties stipulated Helen's estate consisted solely of community property.

In a statement of decision issued on November 3, 2009 after trial, the court found by clear and convincing evidence that Helen was "substantially unable to manage her own financial resources or resist fraud or undue influence." Moreover, Sy's dissipation of community assets to fund the protracted litigation exposed Helen "to a credible threat of being without sufficient resources to address her basic and special needs." The court granted the petition but circumscribed Eileen's powers over the estate "to bring[ing] and prosecut[ing] in all appropriate courts, and seek[ing] all available remedies on [Helen's] behalf for [her] protection, any and all claims against [Sy] for breach of fiduciary duty, mismanagement, abuse and/or related claims. The court expressly directed Eileen to the remedy set forth in section 3057, subdivision (b).

6. Eileen's Effort To Prevent Waste of Helen's Share of Community Property

On February 8, 2010 Eileen filed a petition under section 850, subdivision (a)(1)(D), seeking the conveyance or transfer of Helen's community property, an

accounting, injunctive relief and damages based on Sy's alleged misuse of Helen's assets. The petition alleged Sy had spent nearly \$1.3 million in attorney fees and costs during the almost (at that time) three-year-old litigation. Eileen also filed an application for a temporary restraining order (TRO) barring Sy from spending any further monies contained in an investment account at TD Ameritrade.

At the ex parte hearing on the application for a TRO, the court denied the application without prejudice due to Eileen's delay of three months in filing the application and her failure to establish exigent circumstances justifying a TRO. In the minute order denying the application, the court noted its belief "that [a section] 850 petition brought in the Probate Court might not necessarily be appropriate given, among other authority to be considered, Probate Code section 3057(b)."

Although a hearing was set for March 18, 2010 on Eileen's accompanying motion for a preliminary injunction, she filed another petition in family court seeking the same relief under Family Code section 1101, subdivision (a).¹¹ At a March 30, 2010 hearing on an accompanying order to show cause (and request for injunctive relief), the family court denied relief, concluding it had no jurisdiction over the matter as no petition for dissolution of marriage had been filed.

To cure this apparent deficiency Eileen filed, on Helen's behalf, a petition for legal separation, which was designated an amended petition. After filing the petition for separation, Eileen renewed her application for injunctive relief, which was referred to a new judge. At the ex parte hearing on this application, the court indicated Eileen's petition for separation had not been authorized by the probate court and exceeded the terms of her limited conservatorship but also stated it disagreed with the ruling of the previous judge that a petition for dissolution or separation was required to confer jurisdiction of the family court. However, based on the previous judge's ruling the court lacked jurisdiction, the court concluded it was without power to review or reconsider the orders made by another superior

¹¹ The proceedings on March 18, 2010 are not included in the record, but Sy contends the relief sought by Eileen concerning the TD Ameritrade account was granted by the probate court on March 30, 2010.

court judge. The court denied the requested ex parte relief but scheduled a hearing on the petition's merits for May 25, 2010.

Based on the court's acknowledgement no petition for dissolution or separation was required to confer jurisdiction over a Family Code section 1101 motion, Eileen dismissed the petition for separation without prejudice. At the May 25, 2010 hearing, however, the court informed the parties it could not act because of the dismissal of the petition for separation, under which Eileen had sought injunctive relief. Construing the earlier judge's order as a judgment, the court invited Eileen to consider filing a motion to vacate the judgment under Code of Civil Procedure section 663. Eileen decided to proceed in that manner, and the parties agreed to reconvene on June 25, 2010.

In the interim, however, the court revised its view of such a motion and denied the motion to vacate the earlier judgment. (See *Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1574 ["a motion to vacate lies only where a 'different judgment' is compelled by the *facts* found" and "does *not* lie to vacate a judgment following an erroneous ruling on a demurrer"].) Complaining of the procedural morass presented by the case,¹² the court suggested Eileen appeal from the order of the earlier judge, which it construed as a judgment of dismissal.

CONTENTIONS

Sy appeals from the probate court orders appointing Eileen conservator of the person and over the estate of Helen. He contends the order granting the conservatorship of Helen's estate must be reversed because Eileen's earlier petition for conservatorship of the estate had been tried to judgment and denied. In addition, he contends a conservatorship over an estate containing only an interest in community property is a nullity under section 3051; according to Sy, the proper remedy for alleged mismanagement and abuse of community property must be pursued under the Family Code. With respect to the conservatorship of Helen's person, Sy contends the court failed to make the necessary finding that a conservatorship constituted the least restrictive

¹² When Eileen dismissed the "amended" petition for separation, the court concluded nothing remained in the case.

alternative available to protect Helen's needs. Sy also contends the appointment of Myers as Helen's counsel was unlawful, and the trial court erred in ordering him personally to pay the attorney fees of Myers and Eileen's counsel.

In her appeal from the family court order, Eileen contends that court erred in concluding a petition for dissolution or separation was necessary to confer jurisdiction to consider a claim under Family Code section 1101.

DISCUSSION

1. Standard of Review

The need for a conservatorship must be shown by "clear and convincing evidence." (§ 1801, subd. (e); see *Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611, 620.) However, on appeal from the trial court's order granting or denying a petition for appointment of a conservator, we determine only whether the court's findings are supported by substantial evidence. (See *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881 ["The 'clear and convincing' standard . . . is for the edification and guidance of the trial court and not a standard for appellate review. [Citations.] "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.""].) We view the record in the light most favorable to the judgment below and decide if a reasonable trier of fact could find that granting the petition is appropriate in light of the petitioner's heightened burden of proof. (See *In re Jasmon O.* (1994) 8 Cal.4th 398, 423; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) We are precluded from reevaluating the trial court's credibility determinations. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334 ["questions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses . . . and the determination of [any] conflicts and inconsistencies in their testimony are matters for the trial court to resolve"].) As always, we review an alleged error of law de novo. (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219.)

With respect to the trial court's procedural and evidentiary rulings in a conservatorship proceeding, in general we apply the deferential abuse of discretion standard of review. (§ 1827 [court to hear and determine establishment of conservatorship "according to the law and procedure relating to the trial of civil actions"]; see *People v. Waidla* (2000) 22 Cal.4th 690, 717 ["appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence"].) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

2. *The Conservatorship Over Helen's Estate Was Properly Granted*

a. *The trial court did not abuse its discretion in proceeding on the second estate petition*

Sy contends Eileen's initial petition for a conservatorship of Helen's estate was denied on January 8, 2009 and her subsequent petition for a conservatorship of Helen's estate, filed on January 15, 2009, should have been rejected either as an improper motion for reconsideration (see Code Civ. Proc., § 1008) or under the doctrine of res judicata.

Whether Eileen's original petition for a conservatorship of Helen's estate precluded her second petition was the subject of extensive pretrial motion practice in anticipation of trial on the second petition. In denying Sy's motion to strike Eileen's second petition, the trial court stated, "Review of the [transcript] as well as the [statement of decision] indicates that Eileen Wong was appointed Conservator of the Person only. Not only is there the absence of any adjudication on the issue of the conservatorship of the estate, . . . it appears that the request for conservatorship of the estate had been previously withdrawn by Eileen Wong." The record amply supports this conclusion: On several occasions Eileen, in recognition of Sy's asserted willingness to pay all costs of Helen's care, agreed to withdraw her request for an estate conservatorship in exchange for orders directing Sy to pay the contemplated costs.

In any event, when Sy balked at paying the costs of Helen’s care, as well as the fees generated by his confrontational litigation posture, he invited Eileen’s second petition. The trial court did not abuse its discretion in denying Sy’s motion to dismiss the second petition for conservatorship of Helen’s estate.

b. *The trial court did not err in concluding the conservatorship estate was necessary and permissible*

Sy contends a conservatorship of the estate of Helen was neither necessary nor permissible because Helen’s assets consisted solely of the couple’s community property over which Sy retained control. Absent any property to control, the conservatorship, according to Sy, was a nullity.

Sy is correct Helen’s community property was not subject to the estate conservatorship. When one spouse is incapacitated and has a conservator, the other spouse with legal capacity has “the exclusive management and control of the community property including . . . the exclusive power to dispose of the community property.” (§ 3051, subd. (b)(1).)¹³ Nonetheless, the conservator of an estate also has a duty to supervise management of the conservatee’s community property. The conservator must “keep reasonably informed concerning the management and control, including the disposition, of the community property.” (§ 3057, subd. (b).) If a conservator suspects the rights of the conservatee are being prejudiced, the conservator has a duty to bring an action under Family Code sections 721 and 1100 to enforce the fiduciary and other obligations owed to the conservatee by the spouse or domestic partner. (§ 3057,

¹³ Section 3051 provides in part: “[T]he right of a spouse to manage and control community property, including the right to dispose of community property, is not affected by the lack or alleged lack of legal capacity of the other spouse. [¶] (b) Except as provided in subdivision (c), if one spouse has legal capacity and the other has a conservator: [¶] (1) The spouse who has legal capacity has the exclusive management and control of the community property. . . . [¶] (2) The community property is not part of the conservatorship estate. [¶] . . . [¶] (c) If one spouse has legal capacity and the other has a conservator, the spouse having legal capacity may consent, by a writing filed in the proceeding, that all or part of the community property be included in and, subject to Section 3071, be managed, controlled, and disposed of as a part of the conservatorship estate”

subd. (b).) By appointing Eileen conservator of Helen's estate, albeit with limited powers, the court provided Eileen with the authority to act on Helen's behalf in monitoring potential waste of her assets by Sy. The conservatorship estate was therefore both necessary and permissible.

3. *The Required Finding the Conservatorship Over Helen's Person Was the Least Restrictive Alternative May Be Inferred From the Record and Its Omission from the Statement of Decision Is Harmless Error*

Section 1800.3 provides: "(a) If the need therefor is established to the satisfaction of the court . . . , the court may appoint: [¶] (1) a conservator of the person or estate of an adult, or both. [¶] . . . [¶] (b) No conservatorship of the person or the estate shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee."¹⁴ The probate court failed to make the least-restrictive-alternative finding required by this provision in its statement of decision. Sy argues that omission requires reversal of the order. Although Sy also contends there was no need for the conservatorship because he was able to care for Helen at their home, he does not challenge the sufficiency of the evidence supporting the order.

Eileen does not dispute the court erred by not including the required "least restrictive alternative" finding in the statement of decision (which, as is often the practice, was prepared by her counsel).¹⁵ She contends, however, the omission of the

¹⁴ Current subdivision (b) of Section 1800.3 was enacted in 2007 (see Stats. 2007, ch. 553, § 6, p. 4494) as one of the follow-up recommendations of the Judicial Council's probate conservatorship task force to strengthen the Omnibus Conservatorship and Guardianship Reform Act of 2006, a package of reforms adopted by the Legislature in response to news reports of widespread abuses within the conservatorship system. (See Assem. Com. on Judiciary, Bill Analysis, Assem. Bill No. 1727 (2007-2008 Reg. Session) Aug. 27, 2007.)

¹⁵ The amendment to section 1800.3, subdivision (b), took effect on January 1, 2008. Although we recognize the petition was filed on May 17, 2007, before the effective date of this provision, the court announced its decision on October 21, 2008 and entered judgment on January 8, 2009. In addition, Sy specifically raised the omission of the required findings under section 1800.3 in his objections to the proposed statement of decision. Notably, the court's statement of decision on Eileen's petition for a

finding constitutes harmless error. (See *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745 [“if the judgment is otherwise supported, the omission to make . . . findings [on a material issue] is harmless error unless the evidence is sufficient to sustain a finding in the complaining party’s favor which would have the effect of countervailing or destroying other findings”]; see generally Cal. Const., art. VI, § 13 [“[n]o judgment shall be set aside, or new trial granted, in any cause . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice”].)

We agree the omission of a specific finding the imposition of a conservatorship of Helen’s person was the least restrictive alternative available to protect her, on this record, constitutes harmless error. A statement of decision prepared pursuant to Code of Civil Procedure section 632 “is as much, or more, for the benefit of the Court of Appeal as for the parties. It ‘is our touchstone to determine whether or not the trial court’s decision is supported by the facts and the law.’” (*In re Marriage of Sellers* (2003) 110 Cal.App.4th 1007, 1010.) Unlike *Sellers*, in which the Court of Appeal reversed a decision and remanded to the trial court to prepare a statement of decision because the record failed to reveal the reasoning of the trial court (see *id.* at p. 1011), the extensive record in this case amply illuminates the reasoning of the court, including on the issue of “least restrictive alternative.” There was abundant evidence at trial concerning the necessity of (1) imposing a conservatorship over Eileen’s person and (2) removing her from Sy’s care at the couple’s home. There is no doubt the court concluded, as recommended by Helen’s counsel and the probate investigator, Helen required a conservatorship and, more importantly, required placement in a setting other than with Sy in the couple’s home. A

conservatorship of Helen’s estate did contain the required finding: “Petitioner contends that Conservatee is substantially unable to manage her own financial resources etc., that such a conservatorship is necessary, and that this would be the least restrictive alternative needed for Conservatee’s protection.”

remand would simply result in the same judgment while occasioning yet another round of attorney fees.

4. *The Court Did Not Abuse Its Discretion in Appointing Myers as Helen's Counsel*

Section 1471, subdivision (b), requires the trial court to appoint independent counsel for a conservatee or proposed conservatee for specified conservatorship proceedings (including appointment or removal of conservators) if “the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee.”¹⁶ (*Wendland v. Superior Court* (1996) 49 Cal.App.4th 44, 49-50 (*Wendland*).)

Sy contends his rights were violated when the court appointed counsel for Helen at the inception of these proceedings without prior notice to him. It is difficult to see how the appointment of counsel for Helen in any way interfered with Sy's rights. Several courts have astutely observed, “Appointed counsel does not act as an adversary against those competing for appointment as conservator, but serves as an advocate for the conservatee to ensure that the best suited person is appointed conservator.” (*Wendland, supra*, 49 Cal.App.4th at p. 52, quoting *Conservatorship of Sides* (1989) 211 Cal.App.3d 1086, 1093.) In a contentious proceeding, as this one surely was, appointment of independent counsel was required to enable the court to assess the best interests of Helen, as distinct from the interests of her husband and daughter.

¹⁶ Section 1471, subdivision (b), provides: “If a conservatee or proposed conservatee does not plan to retain legal counsel and has not requested the court to appoint legal counsel, whether or not such person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interests of such person in any proceeding listed in subdivision (a) if, based on information contained in the court investigator's report or obtained from any other source, the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee.”

In his reply brief, Sy belatedly questions the applicability of section 1471 because there was no evidence presented that Helen did “not plan to retain legal counsel.” The circumstances here fully justified proceeding under this provision.

Not surprisingly, it is routine for the probate court to appoint counsel for a proposed conservatee whenever a petitioner intends to seek a conservatorship of the person or estate. Section 1471, subdivision (b), expressly authorizes this appointment to be made “at or before the time of the hearing.” Anticipating the filing of her petition, Eileen completed and filed a form provided by the superior court expressly to ensure that Helen was adequately represented at all hearings concerning her. On May 9, 2007 the court appointed Myers, a member of the court’s probate voluntary panel of attorneys (PVP) constituted precisely for the purpose of providing independent representation to proposed conservatees. Sy could have challenged Myers’s appointment at this initial phase. Instead, he waited until Myers sought compensation for his services more than six months later. The alleged lack of notice of Myers’s initial appointment was simply irrelevant at that juncture.

In sum, the court did not abuse its discretion in appointing Myers as Helen’s counsel, whether or not Sy received notice of the appointment.

5. *The Attorney Fees Orders*

Sy contends the court erred when it ordered him personally to pay the attorney fees and costs of Helen’s appointed counsel and Eileen’s counsel on the ground he was not subject to the court’s jurisdiction. Sy is partially correct. Pursuant to section 1472, subdivision (b), the order should have been directed to the conservator of the estate, if any, and, alternatively, to the conservatee. Helen was liable for the challenged fees and should have been named in the order. However, responsibility for the debt, as Eileen points out, ultimately rested with Sy, who maintained control of the couple’s community property, which was responsible for Helen’s debts. (See Fam. Code, § 910, subd. (a).)

Courts have repeatedly held that a judgment or order misnaming a party may be corrected as a clerical error. (*Boust v. Superior Court of the County of Kern* (1912) 162 Cal. 343, 345-346 [trial court was required, even after appeal, to amend judgment to name correct party]; *Thomson v. L.C. Roney & Co.* (1952) 112 Cal.App.2d 420, 425-426 [judgment amended to name correct judgment debtor]; *Davis v. Rudolph* (1947) 80 Cal.App.2d 397, 405-406 [where judgment named incorrect plaintiff/judgment

creditor, proper procedure was to correct judgment to name proper plaintiff/judgment creditor].) Although Sy could have sought relief below, an appellate court “may correct a judgment containing an obvious clerical error or other defect resulting from inadvertence by modifying the judgment.” (*Hennefer v. Butcher* (1986) 182 Cal.App.3d 492, 506-507.) Accordingly, we modify the orders granting the attorney fee petitions of Myers and Eileen’s counsel to reflect Helen as the obligor rather than Sy.

Finally, Sy claims Eileen improperly acted as conservator of Helen’s person from March 6, 2009—the date Sy filed a notice of appeal from that appointment—until July 20, 2009 when the court sua sponte issued an order directing her “to continue to act as Conservator over the person of Helen Wong.” Sy contends Eileen’s fee petition was wrongly granted for fees incurred during that period.

Like other civil judgments and orders, probate court orders are generally subject to an automatic stay on appeal. (*Kane v. Superior Court* (1995) 37 Cal.App.4th 1577, 1584.) “Probate Code section 1310, subdivision (a), provides that, subject to listed exceptions, an appeal stays the operation of an order.” (*Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 555.) An exception to the automatic appellate stay, however, permits the trial court’s discretionary retention of jurisdiction in limited circumstances, notwithstanding the pendency of an appeal: “Notwithstanding that an appeal is taken from the judgment or order, for the purpose of preventing injury or loss to a person or property, the trial court may direct the exercise of the powers of the fiduciary, or may appoint a temporary guardian or conservator of the person or estate, or both, or special administrator, to exercise the powers, from time to time, as if no appeal were pending. All acts of the fiduciary pursuant to the directions of the court made under this subdivision are valid, irrespective of the result of the appeal. An appeal of the directions made by the court under this subdivision shall not stay these directions.” (§ 1310, subd. (b).)

This exception to an automatic appellate stay must be narrowly construed. (*Gold v. Superior Court* (1970) 3 Cal.3d 275, 282.) “By specifically conditioning the application of the statute upon the prevention of injury or loss to person or property the

Legislature has determined that the exception should be operative only in a limited class of cases.” (*Id.* at p. 281.) The exception “requires an affirmative showing in the trial court of extraordinary circumstances involving potential injury or loss of the sort contemplated by the statute before the exception applies.” (*Id.* at p. 282 [discussing former § 2102].) Its application “must be clearly justified by a showing of risk of imminent injury or loss.” (*Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1261.)

By appointing Eileen temporary conservator on its own motion as soon as it was alerted to the stay, the court invoked this exception; and Sy does not contend the court erred in doing so. Whether Eileen’s actions as conservator were *ultra vires* during the short period after the appeal and prior to this order, thus making her ineligible for fees incurred, was resolved by the parties’ subsequent stipulation on the question of fees. In the stipulation and order filed on December 4, 2009, the parties expressly acknowledged Sy’s objection on this ground but agreed—“after negotiation”—to pay a stated amount for Eileen’s fees. Sy’s counsel approved the stipulation “as to form and content.” We need not consider whether the amount paid to Eileen represented fees for the contested period because the matter has been resolved.

6. *Eileen’s Breach of Fiduciary Duty Petition Should Have Been Pursued in the Probate Court*

In her separate appeal Eileen contends the family court erred in refusing to assert jurisdiction over her petition for breach of fiduciary duty under Family Code section 1101. We affirm the dismissal of her family court action.¹⁷

¹⁷ Sy moved to dismiss Eileen’s appeal on the ground the March 30, 2010 family court’s order was not appealable under Code of Civil Procedure section 904.1, subdivision (a)(1), because there was no signed order of dismissal. (See *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1575 [“an order of dismissal is ineffective as a judgment under Code of Civil Procedure section 581d . . . unless it is in writing, signed by the trial court, and filed”]; see also *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1234, fn. 5.) We denied that motion on the ground the order refused to grant an injunction and is thus appealable under Code of Civil Procedure section 904.1, subdivision (a)(4). Miscitation does not divest this court of jurisdiction.

Section 3057, subdivision (b), in addition to imposing a duty on a conservator to monitor the non-conservatee-spouse's management, control and disposition of community property, also authorizes the conservator to "bring an action on behalf of the conservatee to enforce the duty imposed by Sections 721 and 1100 of the Family Code with respect to the management and control of the community property and to obtain such relief as may be appropriate." These Family Code sections impose a duty on a spouse to manage the couple's community property in accordance with "the general rules concerning fiduciary relationships." (See Fam. Code, §§ 721, subd. (b); 1100, subd. (e).) "This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." (Fam. Code, § 721, subd. (b).)

Family Code section 1101, subdivision (a), creates a right of action for breach of this fiduciary duty: "A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate." (See Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶ 8:612, p. 8-158 (rev. # 1, 2008).)

Subdivision (f) of Family Code section 1101 further states: "Any action may be brought under this section without filing an action for dissolution of marriage, legal separation, or nullity, or may be brought in conjunction with the action or upon the death of a spouse." Subdivision (f) of section 1101 permits a spouse to sue the other spouse for breach of fiduciary duty in one of three ways: (1) without filing an action for dissolution, legal separation, or nullity; (2) "in conjunction with" an action for dissolution, legal separation, or nullity; or (3) on the death of a spouse. (See Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 8:613, p. 9-158.)

The initial family court ruling that Eileen's action for breach of fiduciary duty could not be maintained in the absence of a petition for dissolution or separation was plainly wrong (see Fam. Code, § 1101, subd. (f)), as the second family court judge recognized. We review judgments, however, not reasoning; and we will affirm a trial court's order if it is correct on any ground. (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 278, fn. 5.) Here,

both parties have ignored Family Code section 1103, subdivision (a), which instructs: “Where one or both of the spouses either has a conservator of the estate or lacks legal capacity to manage and control community property, the procedure for management and control (which includes disposition) of the community property is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.” In other words, the correct forum for Eileen’s petition seeking control of Helen’s share of community property was the probate court, not the family court. (Cf. *Conservatorship of Hume* (2006) 139 Cal.App.4th 393, 405, fn. 9 [dictum].) Accordingly, the family court did not err in dismissing the petition for lack of jurisdiction.

DISPOSITION

The orders directing Sy personally to pay the attorney fees associated with the conservatorship of Helen’s person and over her estate are modified to be payable from Helen’s community property. All other orders and judgments are affirmed. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.